

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT KENNETH HAGELSHAW,

Defendant-Appellant.

UNPUBLISHED

May 12, 1998

No. 197478

Calhoun Circuit Court

LC No. 96-000271-FC

Before: Corrigan, C.J., and Hoekstra and Young, Jr., JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment without the possibility of parole for the first-degree murder conviction, to be served consecutively to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Briefly, defendant shot and killed the victim, James Henderson, in defendant's home on December 11, 1995. Defendant testified that Henderson was threatening defendant and defendant's girlfriend, Dee Farris, with a gun and that defendant wrestled the gun away from Henderson and shot him in self-defense. However, the prosecution presented evidence that defendant shot Henderson as he slept on defendant's couch because Henderson had money and drugs on him. A subsequent autopsy revealed that Henderson was shot four times: once in the forehead, once in the temple, once in the back of the neck, and once in the back. Defendant and Farris hid Henderson's body in the garage, wrapped in plastic, until it was discovered by police more than a month later.

I

Defendant first contends that the trial court erred in allowing three prosecution witnesses to testify about statements regarding the shooting that were made to them by Farris, who did not testify at trial. Defendant argues that the admission of these statements violated both the rule against hearsay and the constitutional right of confrontation. We conclude that any error in the admission of Farris' statements was harmless beyond a reasonable doubt because the evidence was merely cumulative of

other testimony regarding defendant's own inculpatory statements. In addition, there was overwhelming evidence of defendant's guilt. See *People v Thinel (On Remand)*, 164 Mich App 717, 721; 417 NW2d 585 (1988).

II

Defendant next argues that he was denied his right to a fair trial when the prosecutor asked defendant to comment on the credibility of several of the prosecution's witnesses. We disagree. Because defendant did not raise the objection urged on appeal, this issue has not been properly preserved. *People v Buckey*, 424 Mich 1, 18; 378 NW2d 432 (1985). Appellate review is therefore precluded unless a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice. *People v Messenger*, 221 Mich App 171, 179-180; 561 NW2d 463 (1997). While similar questions have been found improper, it has been consistently held that any possible prejudice is curable by a specific objection and an appropriate instruction. *Buckey, supra* at 16-17; *Messenger, supra* at 180; *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995), remanded on other grounds 455 Mich 439 (1997). Accordingly, no miscarriage of justice would result from our failure to further review this issue.

III

Defendant also contends that the prosecution improperly remarked that defendant had a duty to retreat. Defendant failed to object to the challenged remarks. We conclude that no miscarriage of justice would result from our failure to further review this issue because a timely instruction, had one been requested, could have eliminated any possible prejudice. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Moreover, the trial court instructed the jury that instructions on the law would come only from the court, and that the jury was to disregard any contrary statements by the attorneys.

IV

Defendant next argues that the trial court erred in giving the jury both the instruction on the general duty to retreat to avoid using deadly force, and the instruction that there is no duty to retreat when assaulted in one's own dwelling. The trial court stated:

By law, a person must avoid using deadly force if he can safely do so. If the Defendant could have safely retreated but did not do so, you can consider that fact along with all the other circumstances when you decide whether he went farther in protecting himself than he should have.

However, if the Defendant honestly and reasonably believed that it was immediately necessary to use deadly force to protect himself from an imminent danger or an imminent threat of death or serious injury, the law does not require him to retreat. He may stand his ground and use the amount of force he believes is necessary to protect himself.

If a person assaulted the Defendant in the Defendant's own home, the Defendant did not have to retreat or get away. Under those circumstances, the Defendant could stand his ground and resist the act with as much force as he honestly and reasonably believed necessary at the time to protect himself.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996).

When the instructions quoted above are read with the remainder of the self-defense instructions given,¹ it is clear that the trial court correctly stated the law and that defendant's self-defense claim was fairly presented to the jury. While the trial court stated the general rule that a defendant must avoid using deadly force by attempting to safely retreat, if possible, it followed that with the specific instruction applicable in the instant case -- that a defendant assaulted in his own home does not have a duty to retreat or otherwise get away. Cf. *People v Lenkevich*, 394 Mich 117, 121-122; 229 NW2d 298 (1975) (finding error requiring reversal where "the trial judge stated the general rule without the pertinent exception.") Accordingly, we conclude that defendant was not denied a fair trial by the trial court's instructions.

V

Finally, defendant argues that the trial court essentially directed a verdict of first-degree premeditated murder when, in response to the jury's inquiry, "Can premeditation take place after the first shot is fired, even if the first shot is not fatal?", the court answered, "Yes." We reject defendant's argument as unfounded. Clearly, the trial court did not instruct the jury that premeditation, an essential element of first-degree murder, was established. While defendant also contends that the trial court's instruction was erroneous, he cites no authority to support that contention. We will not search for authority to sustain a party's argument. *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994).

Affirmed.

/s/ Maura D. Corrigan
/s/ Joel P. Hoekstra
/s/ Robert P. Young, Jr.

¹ The remainder of the trial court's self-defense instructions were as follows:

Now the Defendant claims that he acted in lawful self-defense. A person has the right to use force or even take a life under certain circumstances. If a person acted in lawful self-defense, his actions are excused and he is not guilty of any crime.

You should consider all the evidence and use the following rules to decide whether the Defendant acted in lawful self-defense. Remember to judge the Defendant's conduct according to how the circumstances appear to him at the time he acted.

First, at the time he acted, the Defendant must have honestly and reasonably believed that he was in danger of being killed or seriously injured. If his belief was honest and reasonable, he could act immediately to defend himself, even if it turned out later he was wrong about how much danger he was in.

In deciding if the Defendant's belief was honest and reasonable, you should consider all the circumstances as they appear to the Defendant at the time.

Second, a person may not kill or seriously injure another person just to protect himself against what seems like a threat of only minor injury. The Defendant must have been afraid of death or serious physical injury.

When you decide if the defendant was afraid of one or more of these, you should consider all the circumstances; the condition of the people involved, including the relative strength; whether the other person was armed with a dangerous weapon or had some other means of injuring the Defendant; the nature of the other person's attack or threat; and whether the Defendant knew about any previous violent act or threats made by the other person.

Third, at the time he acted, the defendant must have honestly and reasonably believed that what he did was immediately necessary. Under the law, a person may only use as much force as he thinks is necessary at the time to protect himself.

When you decide whether the amount of force seemed to be necessary, you may consider whether the Defendant knew about any other ways of protecting himself. But you may not – but you may also consider how the excitement of the moment affected the choice the Defendant made.